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No. 86-358

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In the

Supreme Court of the United States

October Term, 1986

American Trucking Associations, Inc., et al.,

Appellants

V.

Henry C. Gray, Director, Arkansas Highway and Transportation Department, et al.,

Appellees

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS
JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the Arkansas HUE tax, the proceeds of which are legislatively dedicated for highway construction and repair, and which is payable by all motor vehicles with a declared gross weight of 73,281 pounds or more, at a rate of a nickle a mile to a maximum of $175.00, violated the Interstate Commerce Clause of the United States Constitution.

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MOTION TO DISMISS JURISDICTIONAL STATEMENT

APPELLEE'S MOTION TO DISMISS AND AFFIRM

Appellee, pursuant to Rule 16.1(b) moves the Court to dismiss the appeal herein or, in the alternative, to affirm the Judgment of the Supreme Court of Arkansas on the ground that the appellants' Jurisdictional Statement raises no substantial federal question.

STATEMENT

In 1983 the Arkansas legislature raised the gross weight limit for motor vehicles traveling over the highways of the state from 73,280 pounds to 80,000 pounds. Act 7 of 1983, Ark. Stat. Ann. §75-817 (Supp. 1985). In that same session the legislature also passed a tax package, Act 685 of 1983, Ark. Stat. Ann. §§75-817.2, 75-817.3 (Supp. 1985) which applied to "all motor vehicles . . . having a declared gross weight of 73,281 pounds or more." Ark. Stat. Ann. §75-817.3 (a)(3). All revenues raised by Act 685 are legislatively designated as special revenues to be exclusively used for road construction and repair by the State and its cities and counties. Ark. Stat. Ann. §75-817.3(m). This non-discriminatory, special revenue "user fee" tax package is being challenged by the appellants as a violation of the Commerce Clause of the United States Constitution.

The thrust of this challenge is an allegation of a "discriminatory impact" of the Act 685 tax package between Arkansas registered motor vehicles and non-Arkansas registered motor vehicles. In order to assess this challenge (and see, in short, the artificiality of this dichotomy) the Court needs some basic facts concerning both modern truck registration laws and the way in which the challenged Arkansas tax package actually operates within the existing registration system. The Court also needs to understand, at the front end, that under the challenged Arkansas law it makes absolutely *no difference in either the options for payment available to a carrier or the tax liability of any individual tax payer whether a motor vehicle is base-plated in Arkansas or base-plated elsewhere.*

A. *Truck Registration, Reciprocity, and the IRP:*

Arkansas imposes a general statutory requirement that all motor vehicles be registered in this state in order to travel on its highways. Ark. Stat. Ann. §§75-809 (Supp. 1985), 75-131, 132 (Repl. 1979). Registration includes payment of a statutory fee

based upon the type of vehicle, as well as its declared gross weight. Ark. Stat. Ann. §75-201 (Repl. 1979). Since 1945, however, Arkansas officials have been authorized to enter into reciprocal agreements with other states to authorize the travel of non-Arkansas "plated" vehicles. Ark. Stat. Ann. §§75-250, 251 (Repl. 1979).

These agreements fall into two types.

The older of these two kinds of agreements are known as "bilateral reciprocity agreements". The essence of such an agreement is that Arkansas agrees to allow, say, trucks base-plated in Rhode Island to travel in Arkansas without paying the Arkansas fee or securing an Arkansas plate, so long as Rhode Island accords reciprocal privileges to Arkansas base-plated vehicles. No money is exchanged. Arkansas currently has bilateral reciprocity with 15 states, primarily those in the Northeast.

All remaining states, including all states contiguous with Arkansas, are, like Arkansas, members of the International Registration Plan. The IRP is an informal compact among its participating states, two provisions of which are important to an understanding of the issues here. First, registration fees are apportioned among member jurisdictions based upon the *percentage* of any carrier's miles generated in each state. [1] In other words, suppose a carrier will travel in Tennessee, Missouri and Arkansas. If he registeres his vehicle in Tennessee (his "Base" state) he

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IRP § III A states: "A. The registration fee for apportionable vehicles shall be determined as follows: (1) Divide the In-jurisdiction miles by total miles generated during the preceding year. (2) Determine the total fees required under the laws of each jurisdiction for full registration of each vehicle at the regular annual or applicable fees, or for the unexpired portion of the registration year. (3) Multiply the sum obtained under Paragraph 2 of this section by the quotient obtained under Paragraph 1 of this section" *International Registration Plan, with Official Interpretations*, American Association of Motor Vehicle Administrators, (Rev. 1981), at 9. IRP manuel introduced as PX.6.

purchases a Tennessee IRP apportioned plate and declares on the appropriate form that he will travel for example, 25% of his miles in Arkansas, 25% in Tennessee, and 50% in Missouri. His license fee in Tennessee will be the sum of 25% of the statutory Tennessee fee, 25% of the Arkansas fee, and 50% of the Missouri fee. He pays this to Tennessee after which Tennessee then forwards the respective amounts to Arkansas and Missouri. The second critical provision of the IRP is related to this: where a motor vehicle is base-plated makes no difference in the amount any other state receives in registration fees; therefore, a carrier is allowed to base-plate in any IRP jurisdiction in which he has an office with a street address to which records can be brought and in which he generates any mileage at all with any of his vehicles. [2]

B. ***Taxes Imposed Under Act 685 of 1983:***

After the gross weight limit in Arkansas was raised from 73,280 pounds to 80,000, the legislature imposed two

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IRP § II (C) (1) states: "C. 1. 'Base Jurisdiction' means, for purposes of fleet registration, the jurisdiction where the registrant has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet can be made available in accordance with the provisions of Article XIV, A(2) . . . Although 'an established place of business' is not defined, it is construed to mean . . . a physical structure owned, leased or rented by the fleet registrant the location which is designated by street number or road location, and which is open during normal business hours, and in which are located: 1) a telephone or telephones publicly listed in the name of the fleet registrant, 2) a person or persons conducting the fleet registrant's business, and, 3) the operational records of the fleet (unless such records can be made available in accordance with the provisions of Article XIV.A.2.) A question has arisen whether all vehicles of a fleet must accrue miles with the jurisdiction chosen as 'base'. If this interpretation were adopted, the registrant would be forced to make certain that every vehicle of a fleet traveled some of its miles in the 'base' each year. This requirement would contravene the purpose of granting operational flexibility. The Plan is construed broadly to require only the accrual of miles by the fleet as a whole; each vehicle need not individually enter the base jurisdiction." Id., at 5.

taxes on this new weight category. First, all of those vehicles which were previously required to pay a registration fee to Arkansas are required to calculate that fee for this new class of vehicles "at the maximum registration fee for 68,001 to 73,280 pounds, as provided in Subsection (7) of Subsection (c) of Section 24 . . . ". Ark. Stat. §75-817.2 (Supp. 1985). Second, the Act also imposes the Highway Use Equalization Tax of Ark. Stat. Ann. §75-817.3 (Supp. 1985), payable generally at $ .05 a mile up to a maximum payment of $175.00.

For analytical purposes, there are really three groupings of motor vehicles from which payment is exacted.

First, wholly intrastate Arkansas carriers with a declared gross weight of over 73,280 pay a flat registration fee of $1,044.00 (See, Ark. Stat. Ann. §75-201(c)(7) (Repl. 1979)) plus a flat $175.00 HUE tax imposed by Ark. Stat. Ann. §75-817.3(f)(2). Intrastate carriers do not have the five cent/mile option because they are not subject to apportioned registration under the International Registration Plan and hence do not report their mileage to anyone.

Second, motor vehicles base-registered in any IRP signatory state pay an apportioned registration fee to Arkansas through the International Registration Plan. As stated above the fees under this apportioned registration system are based not on actual miles, but on the percentage of miles traveled in this state. For example, a heavy motor vehicle traveling 10% of its miles in Arkansas will pay a registration fee of 10% of $1,044.00 or $104.40. In addition such a carrier will pay the HUE tax at a rate of five cents/mile to a maximum of $175.00 or purchase individual trip permits at a rate of $8.00/hundred miles. [3] Ark. Stat. Ann. §75-817.3(f), (i) (Supp. 1985).

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Appellees concur with appellants' Jurisdictional Statement, at 3, n.1. This option is not material to the resolution of this case.

Third, non-IRP registered vehicles secure authority to travel in Arkansas for registration fee purposes through "reciprocity". Such non-Arkansas, non-IRP base registered vehicles paid no registration fee in this state prior to the enactment of Act 685 and continue to pay none. See Ark. Stat. Ann. §75-817.2 and Ark. Stat. Ann. §75-817.3(b) (Repl. 1985). They do however pay an HUE tax (if they declare through the qualification process a gross weight in Arkansas in excess of 73,280 pounds) of five cents/mile to a maximum of $175.00 or purchase individual trip permits at a rate of $8.00/hundred miles.

C. ***This Litigation.***

This appeal is from a decision of the Arkansas Supreme Court affirming two challenges to Act 685 of 1983 consolidated by the State Supreme Court for purposes of appeal. Only the first of those cases, *Arkansas Trucking Associations, Inc. v. Gray et. al.*, Ark. S.Ct. No. 85-101 involved an issue covered by the appellants' Jurisdictional Statement. The second case, *Arkansas Trucking Associations, Inc. v. Ragland, et al.*, Ark. S.Ct. No. 85-112 involved the construction of Amendment 19 to the Constitution of the State of Arkansas. There is apparently no appeal from that decision and none would lie.

THE APPEAL DOES NOT RAISE ANY SUBTANTIAL FEDERAL QUESTIONS

A. ***The Challenged Tax Is A Facially Neutral User Fee Valid Under Capitol Greyhound v. Brice, 339 U.S. 542 (1950) And Massachusetts v. United States, 435 U.S. 444 (1978).***

The challenged HUE tax portion of the taxes levied by Act 685 of 1983, Ark. Stat. Ann. §75-817.3 (Supp. 1985), can be analyzed as a flat rate tax of $175.00 with a payment option for carriers traveling less than 3500 miles in

Arkansas that provides them with a dollar and cents tax savings upon payment at a rate of a nickle a mile. As the Arkansas Supreme Court correctly found: "[t]he money collected is used to offset highway repairs and costs and thus the HUE tax is in the nature of a user fee or tax." *American Trucking Associations v. Gray*, 288 Ark. 488, 495, 707 S.W.2d 759, 762 (1986); Ark. Stat. Ann. §75-817.3(m) (Supp. 1985). The tax is non-discriminatory on its face, applying to "all users of motor vehicles" (Ark. Stat. Ann. §75-817.3(b), with "motor vehicles" previously defined as any vehicle " . . . having a declared gross weight of 73,281 pounds or more." Ark. Stat. Ann. §75-817.3(a)(3).

The appellants admit this facial neutrality. But, in their attempt to develop a "substantial federal question", they skirt its essential correlaries: All options of payment are freely available to all users of motor vehicles regardless of where they may be base-registered and it makes absolutely no difference in the actual tax liability of any individual carrier what base-plating may have been chosen.

It is of course recognized that *any* flat rate vehicle tax will inevitably result in different payments per mile based upon the number of miles traveled in the taxing jurisdiction. This will be true even under a tax like that challenged here in which this result is ameliorated somewhat by the nickle a mile option. Although tangential reference is made in the appellant's Jurisdictional Statement to numerous contemporary commerce clause cases, the sole line of doctrinal support that this feature renders a flat rate tax unconstitutional is found in this Court's handling of the "drummer cases" culminating in *Nippert v. Richmond*, 327 U.S. 416 (1946); see also *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887); *Best and Company v. Maxwell*, 311 U.S. 454 (1940).

Yet in citing this line of authority [and identifying with it the bus tax overturned in *Sprout v. South Bend*, 277 U.S. 163 (1928)], the appellants confront the salient

distinguishing feature: the taxes imposed by Act 685 of 1983 are special, not general, revenue levies and the law is clear that these kinds of legislatively-designated special use motor vehicles taxes are not violations of the Commerce Clause, even when they are *completely* flat rate fees.

The theoretical foundation for such legitimacy is that the tax is not levied on *actual use* of the roads, but upon the *privilege* of making such use. "The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he might." *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285, 289 (1935).

In the case of *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) decided four years after *Nippert, supra*, the Court was unanimous in its support of non-mileage based motor vehicle taxes. Following a lengthy review, the majority declared "it is clearly within the discretion of the State to determine whether the compensation for the use of its highways by automobiles shall be determined by way of a fee, payable annually, or by a toll based on mileage or otherwise". 339 U.S. 542, at 544-545. Even in the dissent (which revolved around the incidence of the tax being on a vehicle's purchase rather than a right to use the roads) Justice Frankfurter favorably reviewed the relevant case law:

> Again, if the State makes clear by disposition of the tax proceeds or by statutory declaration that the tax is levied to secure compensation for road use, the tax classification will be sustained if it may fairly be attributed to the privilege of road use, as distinguished from actual use. Compare *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (no allocation of proceeds) with *Clark v. Poor*, 724 U.S. 554 (allocation); see Appendix, post, p. 561. Thus, mileage may be ignored and an annual tax may be based on horsepower, *Hendrick v.*

> *Maryland*, 235 U.S. 160; on carrying capacity, *Clark v. Poor*, 274 U.S. 554, and *Hicklin v. Coney*, 290 U.S. 169; and on manufacturer's rated capacity, *Dixie Ohio Express Co. v. State Revenue Comm'n*, 306 U.S. 72. And the Court has upheld flat fees imposed without regard to size or weight factors, *Aero Mayflower Transit Co. v. Georgia, Public Service Comm'n*, 295 U.S. 285; *Morf v. Bingaman*, 298 U.S. 407; *Clark v. Paul Gray, Inc.*, 306 U.S. 583; *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs*, 332 U.S. 495.

339 U.S. at 551.

The Appellants now insist that this whole body of case law has been rendered moot *sub silentio* by the Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Of course, there is no inconsistency between the result in the *Capitol Greyhound, supra*, line of cases and the fourth prong of the *Brady* test when the "services provided by the State" are viewed as the *opportunity* to haul an unlimited number of miles. In any case, the Supreme Court has specifically reaffirmed the validity of these cases in a post-*Brady* decision. In *Massachusetts v. United States*, 435 U.S. 444 (1978) the Court validated a flat-rate federal airport tax by analogy to the "accepted" status of flat rate motor vehicle taxes:

> Having established that taxes that operate as user fees may constitutionally be applied to the States, we turn to consider the Commonwealth's argument that §4491 should not be treated as a user fee because the amount of the tax is a flat annual fee and hence is not directly related to the degree of use of the airways. This argument has been confronted and rejected in analogous contexts. *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950), is illustrative. There the Court rejected an attack under the Commerce Clause on an annual Maryland highway tax of "2% upon the fair market value of motor vehicles used in interstate Commerce." The carrier argued that

the correlation between the tax and use was not sufficiently precise to sustain the tax as a valid user charge. Noting that the tax "should be judged by the result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted," id., at 545, 70 S.Ct., at 808, the Court rejected the carrier's argument:

> "Complete fairness would require that a state tax formula vary with every factor affecting appropriate compensation for road use. These factors, like those relevant in considering the constitutionality of other state taxes, are so countless that we must be content with 'rough approximation rather than precision.' . . . Each additional factor adds to administrative burdens of enforcement, which fall alike on taxpayers and government. We have recognized that such burdens may be sufficient to justify states in ignoring even such a key factor as mileage, although the result may be a tax which on its face appears to bear with unequal weight upon different carriers. . . . Upon this type of reasoning rests our general rule that taxes like that of Maryland here are valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." Id. at 546-547, 70 S.Ct., at 809 [Citations and footnotes omitted.]

See also, *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs.*, 332 U.S. 495, 68 S.Ct. 167, 92 L.Ed. 99 (1947).

430 U.S. 444, 463 (1978).

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), cited by the appellant, does contain dicta that *any* proportional tax meets the fourth prong of the *Complete Auto* test. Even this dicta however does not purport to reach as far as its converse, i.e. that no flat rate tax ever can meet this test. In any event, *Commonwealth Edison*, *supra*, explicitly limits the application of its analysis of the fourth prong of *Complete Auto* to general revenue taxes:

> The Montana Supreme Court held that the coal severance tax is "imposed for the general support of the government" 615 P.2d, at 856, and we have no reason to question this characterization of the Montana tax as a general revenue tax. Consequently, in reviewing appellant's contentions, we put to one side those cases in which the Court reviewed challenges to "user" fees or "taxes" that were designed and defended as a specific charge imposed by the State for the use of state-owned or state-provided transportation or other facilities and services.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621 (1981).

In an effort to create some contemporary necessity for the Court to review this persuasive body of authority, the appellants claim that seven states *since 1980* have begun imposing this sort of "constitutionally suspect" tax. The truth is that some form of flat rate tax, usually in the form of a registration fee, has long been a fixture in the mix of highway taxes in every state in the Union. [4] Admittedly, under the International Registration Plan described above, the registration fees of thirty-three states are apportioned, but this is an apportionment based on the *percentage* of miles traveled in each jurisdiction the previous year. The resulting payment amount due each participating IRP state is in essence a flat rate fee: if 20% of an IRP apportioned carrier's mileage is in Arkansas it will pay Arkansas the same $209.00 [5] in an annual registration fee regardless of whether the actual number of miles generated in the state by the registering motor vehicle is 1,000 or 10,000.

Similarly the appellants press for review citing "a large volume of Commerce Clause litigation and inconsistent judicial decisions." (at 9). The truth is that only three State

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4 *Polk Motor Vehicle Registration Manual* (R.L. Polk Co. April, 1986)

5 $1044 x .20 = $208.80. See, Ark. Stat. Ann. §75-201 (C) (7) (Repl. 1979).

Supreme Courts have been confronted with the validity of facially non-discriminatory motor vehicle special revenue "user" taxes in which this sort of inherent disparity in cost per mile played a part in the analysis of the flat rate aspect of the challenged tax: the Maryland registration fee, Md. Transp. Code Ann §13-423(a) (1984); the Arkansas Highway Use Equalization Tax, Ark. Stat. Ann. §75-817.3 (Supp. 1985); and the Pennsylvania marker fee and axle tax, Pa. Cons. Stat. Ann. tit. 75 §§2102 (Purdon 1981) and 9901 et. seq. (Purdon Supp. 1986). In all three instances the courts *upheld* the tax relying upon that clear line of authority emanating from this Court in *Aero Mayflower Co. v. Georgia Public Serv. Comm'n*, 295 U.S. 285 (1935) through *Aero Mayflower Transit Co. v. Board of Railroad Comm'rs.*, 332 U.S. 495 (1947) and *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) culminating in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts v. United States*, 435 U.S. 444 (1978). See, *American Trucking Associations Inc., v. Goldstein*, 483 A.2d 47 (Md. 1984); *American Trucking Associations Inc., v. Gray*, 288 Ark. 488, 707 S.W.2d 259 (1986); *American Trucking Associations, Inc. v. Scheiner*, 509 A.2d 838 (Pa. 1986).

The only actual "inconsistent" decisions the appellants have cited are *American Trucking Associations, Inc. v. Conway*, 142 Vt. 17, 451 A.2d 42 (1982) (in which the appellants challenged a tax which on its face applied solely to non-Vermont registered vehicles) and *American Trucking Association Inc. v. Conway*, Vt. Super. Ct., Washington County (May 29, 1986), which merely grants a preliminary injunction, pending a trial on the merits, placing in escrow funds collected under a challenged flat rate fee which is facially non-discriminatory.

B. ***No Showing of Manifestly Disproportionate Amount.***

Throughout this litigation, the appellants have not even attempted to meet the established test for challenging

state imposed highway user fees. Such levies have been upheld "unless the amount is shown to be in excess of fair compensation for the *privilege* of using state roads". *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 546-547 (1950), cited in *Massachusetts v. United States*, 430 U.S. 444, 463 (1978) [emphasis added]. Moreover, the burden of asserting the requisite "manifest disproportion" clearly rests on anyone challenging the validity of the tax. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 548 (1950).

No taxpayer is assessed more than $175.00 under the Arkansas HUE tax and since this challenge is really mounted on behalf of the mileage option payees, the actual dollars and cents charge being questioned is below that "high dollar" figure. Yet even $175.00 is well within the constant dollar amount of fees previously held valid by the Court. For example, the twenty five "1935 dollars" approved in *Areo Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935) equates with $186.03 in 1983 dollars;[6] yet in 1935 the Georgia truck weight limit was only 12,500 pounds[7] compared to Arkansas' current 80,000 pounds. In short, the approved fee in 1935 was for more money and substantially less privilege. Similarly, in 1950 the Capitol Greyhounds Company challenged Maryland's levies of $505.17, $580.00, and $732.55[8]; an equivalent 1983 flat rate charge would have been $2,090.00, $2,400.00, and $1,542.00,[9] respectively.

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The Consumer Price Index (1967 = 100) was 40.1 in 1935 and 298.4 in 1983. U.S. Dept. of Labor, *Handbook of Labor Statistics 1975-Reference Edition* and *Consumer Price Index U.S. City Average 1975-1986.*

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Ga. L., 1931, (Ex. Sess.) p. 114.

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Capitol Greyhound Lines v. Brice, 339 U.S. 542, 546 (1950).

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The Consumer Price Index in 1950 was 72.1; in 1983 the CPI was 298.4.

Still, the record does reflect that the plaintiff/appellants may not have attempted to show "excessive" charges because they knew such proof could not be found.

Leroy Mallory, Director of Transportation for Tyler Pipe Industries (one of the name-plaintiff/appellants in this litigation) testified that the actual cost of operating one of his vehicles was $1.00/mile. [10] This is the only cost data in the record. In 1983 the Arkansas legislature raised its gross weight limit from 73,280 pounds to 80,000 pounds, which allowed truck carrying capacity to increase by 6500 pounds or some 14-16%. This percentage is computed by comparing the increase with the previous freight capacity of 43,000 pounds. [11] Since the HUE tax was imposed to pay for this increased weight limit, an (at most) 5% increase in costs/mile (assuming the nickle a mile option, the highest cost/mile paid by anyone) can not be considered excessive for a 14-16% increase in load capacity.

This favorable individual carrier cost/benefit analysis carries through on an industry wide basis.

Ralph Johnson, a transportation engineer and consultant who was called as a witness by the appellants themselves, had prepared a study, finding that in 1982 the industry benefit from an increase in allowable gross weight from 73,280 pounds to 80,000 in Arkansas would have

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Gray T. 1508.

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Empty five axle vehicles weigh 28,000-31,000 pounds. Therefore, under the pre-1983 Arkansas weight limit of 73,280 pounds, freight capacity would have been around 43,000 pounds. *Gray*, T. 2308.

amounted to over $115 million a year. [12] Charles Venable, an engineer for the State, testified that the increased weight would result in an additional $53 million in needed repairs annually on Arkansas' interstate and primary system alone. [This was the damage figure relied upon by the trial court in setting the proposed bond on the request for a preliminary injunction. See, *American Trucking Association Inc. v. Gray*, 280 Ark. 258, 657 S.W.2d 207 (1983)]. The Highway Use Equalization Tax is designed to raise a little over $20 million a year. Thus, on an industry wide basis the funds to be raised are not disproportionate to either the private benefits secured or the public costs incurred.

The *structure* and *amount* of the tax (5 cents a mile to a maximum of $175.00) then is clearly within accepted Constitutional bounds.

C. *ATA Survey Not Probative of Unconstitutional Discrimination.*

In *American Trucking Associations v. Goldstein*, 483 A.2d 47 (Md. 1984), *American Trucking Associations v. Gray*, 709 S.W.2d 410 (Ark. 1986), and *American Trucking Associations v. Scheiner*, 509 A.2d 838 (Pa. 1986), three State Supreme Courts have assessed trial court records challenging facially non-discriminatory user taxes, the evidentiary centerpiece of which was an ad hoc "survey" of truckers' alleged costs per mile. In none of the three challenges did Appellate Courts find the survey data a persuasive indicator of unconstitutional discrimination.

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12 The actual reported savings was $115.8 million annually. DX.2. "Costs and Savings Associated with Changes In Weight Limits on Arkansas' Highways", Counseltrans Inc., (Rockville, Md. Oct. 1982) at 8. Ralph Johnson called by the appellants was author of the report and president of Counseltrans, Inc.

In this case the ATA survey purports to show something about the motor carriers' actual operating costs. An initial problem with the appellant's survey results, however, is that by isolating only the HUE portion of the taxes borne by heavy trucks in Arkansas, the survey is simply not probative of anything under an "actuality of operation" test. As this Court recently stated: "A state tax must be assessed in light of its actual effect considered *in conjunction with other provisions of a State's tax scheme.* 'In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' [Citations omitted]" *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981). This need to look further than at a single tax is particularly pressing when the challenged Act itself (Act 685 of 1983) levied *both* the HUE tax and a registration fee on all motor vehicles with a declared gross weight in excess of 73,280 pounds. Ark. Stat. Ann. §§75-817.2, 75-817.3 (Supp. 1985).

Now, it is obvious that in actual operation, the IRP apportioned licensed fee (discussed in the appellees' Statement) is a boon to the heavy interstate hauler with a low percentage of Arkansas miles. Take, for example, four carriers, each hauling 5,000 miles in Arkansas. The first is a wholly intrastate carrier who pays $1,044.00 for his "J" tag, or around 20 cents/mile. The second is licensed under the IRP and travels 5,000 miles in Arkansas and 5,000 in another state he pays $522 to Arkansas for his license, or 10 cents/mile. The third is a coast-to-coast IRP carrier who travels 50,000 miles a year, 5,000 of which is in Arkansas he pays only $104 for his license fee or 2 cents/mile. The fourth is a non-IRP licensee who is licensed in a state with a reciprocity agreement in Arkansas and he pays absolutely no license fee in this state.

An example of the heavy interstate hauler is the plaintiff/appellant Transcon Lines Inc. who because of sheer

size is able to operate "pony express' style 24 hours a day from coast-to-coast. [13] Such a company can obviously churn out two or three times the miles (and therefore pay one half to one third of the registration fee per mile) of the hardest working owner/operator.

An auditor for the highway Department calculated the registration fee per mile for both Arkansas-based and non-Arkansas-based carriers appearing on the surveys chosen at random. She found a spread of between .84 to 19.88 cents per mile for the Arkansas base-registered carriers and between .55 to 1.8 cents per mile for the non-Arkansas base-registered trucks. Again, the survey data submitted by the appellants tells nothing about the total tax burden borne by the surveyed carriers and evidence *in the record* established that, without this information, the survey cannot be probative of the "actuality of operation".

There is a second conceptual problem with relevance of the information generated by the ATA survey.

The appellants in their Jurisdictional Statement refer to the survey data as drawing a distinction between "in state" and "out of state" trucks. (at 15). Such labeling is deceptive. Clearly the breakdown is not between "intrastate" and "interstate" commerce. Almost all carriers on *both* lists are interstate carriers. Of the 156 carriers on the Arkansas-based list, at least 138 had registered through the Arkansas IRP office and were therefore interstate operators. [14]

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"The Buffalo driver takes his rest while the Indianapolis driver takes the same power unit hooked to the same trailer to Kirkland, Missouri where he would rest, the Kirkland driver takes it to Oklahoma City where he rests, and the Oklahoma City driver takes it to Tecumcari, New Mexico where he rests, the Tecumcari takes it to Winslow where he rests, the Winslow driver takes it to Barstow where he rests and then Barstow driver takes it to its ultimate destination, being Los Angeles." *Gray*, T. 1561.

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Gray, T. 1995.

In fact most of the vehicles on both surveys are base-registered on an apportioned basis under the International Registration Plan. The significance of this is that, under the liberal licensing criteria of IRP "base jurisdiction", where a vehicle is licensed is *no real indicator* of whether he is domestic or non-domestic for purposes of establishing parochial discrimination under the Interstate Commerce Clause. Many, if not most, IRP carriers operate in a multiplicity of jurisdictions and can and do conveniently register in several of them. Individual trucks may be base-plated in a state in which they never even travel. See, note 2.

The record in this case is full of examples of how fluid the situation is. For example, Mr. Paul Martinson testified that the Plaintiff Diamond Transportation System, Inc., is a Wisconsin Corporation with headquarters in Racine, Wisconsin, but licenses its vehicles in Oklahoma. Many carriers license some vehicles in Arkansas and some elsewhere, thus appearing on both lists. Even Arkansas Best Freight licenses its vehicles in Illinois. [15] Doug Hughes, the ATA official who coordinated the survey information, admitted that his lists ignore corporate citizenship and the probably more important indicator of "home office" domicile. The result, he said, is "Arkansas" companies which license in other states show up on the "foreign" list and foreign companies that license in Arkansas show up as Arkansas registrants. [16]

The law is clear that " . . . [o]ne of the fundamental principles of Commerce Clause jurisprudence is that no State consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to *local business.*' *Nothwestern States Portland Cement Co. v. Minnesota*, 358

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PX. 45-46.

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Gray, T. 439.

U.S. 450, 458 (1959). See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977)." *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). But the record in this case is clear that IRP registered interstate carriers may not be "local" (in that sense) anywhere. At the very least, the place where they base register has very little necessary connection with where that "locality" may be.

Moreover, whether a particular carrier is Arkansas base-registered or non-Arkansas base-registered makes absolutely no difference in the amount of Arkansas tax he will ever pay. This is uncontested by the appellants. Unlike the decision of where to locate a manufacturing plant in view of the West Virginia gross receipts tax credit [*Armco v. Hardesty*, 467 U.S. 638 (1984)], or where to ship exported goods under the New York franchise tax credit [*Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984)], or where to trade stock in view of the New York State transfer tax [*Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977)], the decision of where to base-register a motor vehicle in view of Act 685 of 1983 remains "tax neutral". Thus, in terms of those traditional commerce clause concepts guaranteeing "an area of free trade among the several states . . . " *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 402 (1984), the statistical claims propounded through the appellant's survey data are essentially irrelevant.

Finally, most of the raw data in the survey is unverifiable and therefore inadmissible hearsay. The information was gathered by special survey questionnaires prepared by the American Trucking Association solely for the purposes of this litigation. The responses generated were clearly out of court statements by unavailable declarants introduced for the truth of matter stated. Theoretically *some* of this information is of course verifiable in the state's IRP registration or motor fuel tax records available to the defendants. However, because IRP and motor fuel tax records report only gross *fleet* miles, without

regard to the declared gross weights of the vehicles comprising the fleet, three categories of responses would not be verifiable: the mileage claims of intrastate Arkansas carriers, the mileage claims of IRP carriers who did not qualify their whole fleets to haul in excess of 73,280 pounds, and the mileage claims of any "reciprocity" carrier who chose the annual option or did not register all vehicles in his fleet to carry in excess of 73,280 pounds.

Auditors for the Highway Department tried to determine the extent to which the survey information was capable of verification. On the Arkansas base-registered list the auditors could only find information on 59% of the carriers on the list and only verify half of that. On the non-Arkansas base-registered list a random 8% sample revealed so many discrepancies in either the number of miles or the number of trucks reported, or both, that the exercise was halted. [17] After establishing this foundation that such a high percentage of the information was from out of court statements not subject to verification, the defendants moved to strike the admission of the surveys as hearsay. The trial court overruled the objection indicating that the lack of verification from public records went to the weight rather than the admissibility of the evidence. [18]

D. *Existing Taxes*

At the conclusion of their Jurisdictional Statement (at 21-22) the appellants raise the "legislative" policy argument that the challenged tax is unnecessary and that existing motor fuel and registration taxes would provide adequate

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This attempt at verification is erroneously described by the appellants' Jurisdictional Statement as "a similar study by the appellees", at 9.n.2.

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Gray, T. 2066. A similar survey is accurately described by the Maryland Supreme Court as "an unvalidated informal survey". *American Trucking Associations, Inc. v. Goldstein*, 483 A.2d 47, 54 (Md. 1984).

state revenues. The doctrinal wedge for asserting this policy preference is the Court's familiar formulation for assessing state business regulations, not state taxes. A state economic regulation, which even-handedly effectuates a legitimate local purpose, will be upheld if the burden on commerce is incidental and not excessive in relation to the putative benefit. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Court does not apply this balancing test to set state tax policy. All of the cases cited for this proposition in the appellant's statement at 21-22 involve business regulations. The only exception is *Continental Trailways, Inc. v. Director*, 509 A.2d 769 (1980), in which the New Jersey Supreme Court refused to apply the balancing test in an effort *by the State* to sustain a facially discriminatory levy.

This does, however, bring up a point bearing on the substantiality of the appellant's request for review: neither existing registration fees nor motor fuel taxes could meet the exacting level of review the appellants propose to utilize here. Both kinds of taxes are applied in all states. [19]

As noted above, registration fees are flat rate taxes, even registration fees that are apportioned through the International Registration Plan. Because the resulting fee is determined by the percentage of miles in a given jurisdiction, not the actual miles, the fee is merely a flat rate tax with inherently limited potential as a revenue raiser. (The political disincentive of raising registration fees on paper, say, $10.00 to get a $1.00 back in the State treasury is rather obvious). Moreover, as noted above, the apportioned registration is a subsidy of the "pony express" style company like the appellant Transcon, at the expense of a smaller, less flexible company or an owner/operator.

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19 *Polk Motor Vehicle Registration Manual*, (R.L. Polk Company, April, 1986).

The structural deficiency in motor fuel taxes is more subtle. The record in this case reflects a unanimous engineering judgment that motor vehicle wear and tear on the highways increases *at an increasing rate* as a motor vehicle's weight increases. [20] Yet motor fuel efficiency (a key determinant in the payment of any motor fuel tax) decreases *at a decreasing rate* as weight increases. The result is a subsidy of the highest weight category of vehicles by those which are lighter, a subsidy that will only increase with increasing reliance on the motor fuel tax in a state's mix of highway user fees. [21]

This discussion is not to suggest that all taxes, in all states, are Constitutionally suspect. It does point out that the question of what mix is needed is inherently a legislative choice and that it should not be made by considering one aspect of that mix in isolation, as was done by the appellants in the record here. The existing safeguards of *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950) met by Act 685 in this case, provide adequate protection for *both* state flexibility in raising road system revenues and the flow of national commerce that such a road system makes possible.

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Both the appellant's expert witness, Ralph Johnson and the appellee's witness, Assistant Chief Engineer Charles Venable concurred that this is the accepted significance among highway engineers of the empirical AASHTO road test.

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U.S. Dept. of Transportation, *Vol. 1, Main Text State Highway Cost Allocation Guide*, (October, 1984), at III-11: "Fuel tax contributions per vehicle mile increase with vehicle weight because fuel efficiency declines with weight, but these contributions increase much less rapidly than responsibilities. Therefore a single rate fuel charge, planned to match the lightest vehicle's responsibility, would not achieve the correct revenues for the heavier vehicles."

CONCLUSION

The appellant's Jurisdictional Statement does not raise any substantial federal question and this appeal should be dismissed, or in the alternative, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served three copies of the foregoing Motion to Dismiss on Stephen M. Shapiro, 2000 Pennsylvania Avenue, N.W., Washington, D.C. 20006 and Daniel R. Barney, 2200 Mill Road, Alexandria, VA 22314-4654, by placing same in the U.S. Mail, First Class, Postage Prepaid, this 9th day of October, 1986. There are no other parties to the proceeding.

/s/ Chris Parker

APPENDIX

ARK. STAT. ANN.

75-131. Registration and certificate of title required.—It shall be a misdemeanor for any person to drive or move or for an owner knowingly to permit to be driven or moved upon any highway any vehicle of a type required to be registered hereunder which is not registered or for which a certificate of title has not been issued or applied for or for which the appropriate fee has not been paid when and as required hereunder, except that when application accompanied by proper fee has been made for registration and certificate of title for a vehicle it may be operated temporarily pending complete registration upon displaying a duplicate application duly verified or other evidence of such application or otherwise under rules and regulations promulgated by the commissioner.

75-250. Commission to make reciprocal agreements relating to operation of motor vehicles — Members.—An ex-officio Commission, composed of the Coimmissioner of Revenues, who shall serve as Chairman, the Director of Highways and the Chairman of the Public Service Commission [Arkansas Transportation Commission], is hereby established for the purpose of representing the State of Arkansas in the matter of making reciprocal agreements relating to the operation of motor vehicles.

75-251. Reciprocal agreements as to allocation and apportionment of registration pursuant to formula — Safety rules unaffected.— The Commission is hereby authorized to negotiate and consummate reciprocal agreements with the duly authorized officials or representatives of any state or the several states of the United States, whereby residents of such other state or states who operate commercial motor vehicles may allocate and apportion the registration of such commercial motor vehicles in accordance with any formula mutually agreed upon between the Commission and the

representatives or officials of such state or states. Provided, residents of this State are granted the same allocation and apportionment privileges for commercial motor vehicles' registration in such other state or states. Also provided, that nothing in this Act shall be construed as relieving any motor vehicle owner or operator from complying with all laws, rules and regulations pertaining to safety of operation of motor vehicles and the highway maximum weight standards and the preservation of the highways of this State.

75-809. Registration of vehicles—Weight limitation—Brakes—Display of registered gross weight—Operation with excess weight unlawful—Federal use tax payments.—(a) The commissioner, upon registering any vehicle under the laws of this state which vehicle is designed and used primarily for the transportation of property or for the transportation of 10 or more persons, may require such information and may make such investigation or test as necessary to enable him to determine whether such vehicle may safely be operated upon the highways in compliance with all the provisions of this Act. He shall register every such vehicle for a permissible gross weight not exceeding the limitation set forth in this Act. Every such vehicle shall be equipped with brakes as required in Section 124 [§ 75-724] of this Act.

(b) The Commissioner shall insert in the registration card issued for every such vehicle the gross weight for which it is registered, and if it is a motor vehicle to be used for propelling other vehicles he shall separately insert the total permissible gross weight of such motor vehicle and other vehicles to be propelled by it. He may also issue a special plate with such gross weight or weights stated thereon, which shall be attached to the vehicle and displayed thereon at all times. It shall be unlawful for any person to operate any vehicle or combination of vehicles of a gross weight in excess of that for which registered by the commissioner or in excess of the limitations set forth in this Act. Further, the Commissioner shall implement rules and

regulations issued by the United States Secretary of Transportation pertaining to federal use tax payments.

75-817. Single and tandem axle load limit . . .

(d) Subject to the limit upon the weight imposed upon the highway through any one (1) axle as set forth in subsections (a), (b) and (c) of this Section, no vehicle, or combination of vehicles, shall be operated upon the highways of this state when the gross weight is in excess of eighty thousand (80,000) pounds. Provided, that the foregoing maximum gross weights shall be applicable to vehicles, or combinations of vehicles, operated on highways in this state that are a part of the federal interstate highway system or that have been designated by the State Highway Commission as primary highways, and on all other highways in this state the maximum gross weight of any vehicles or combinations thereof shall not exceed sixty-four thousand (64,000) pounds. Provided, further, that vehicles, or any combination of vehicles, of a gross weight in excess of sixty-four thousand (64,000) pounds and not in excess of seventy-three thousand two hundred and eighty (73,280) pounds may operate upon the secondary highways of the State at a speed not in excess of forty (40) miles per hour. Vehicles, or any combination of vehicles, of a gross weight in excess of seventy-three thousand two hundred and eighty (73,280) pounds and not in excess of eighty thousand (80,000) pounds operating on the secondary highways of the state shall also be limited to a maximum speed of forty (40) miles per hour. Provided, that greater gross weights than permitted may be authorized by special permit issued by competent authority as authorized by law or lesser gross weights will be required when highways are posted.

75.817.3. Highways use equalization tax. . . .

(m) All fees, taxes, penalties and interest collected under the provisions of this Section of this Act not specifically classified as "Constitutional and Fiscal Agencies

Funds" shall be classified as "special revenues" and shall be deposited in the State Treasury, and the net amount thereof shall be transferred by the State Treasurer on the last business day of each month; 15% of the amount thereof, to the County Aid Fund; 15% of the amount thereof, to the Municipal Aid Fund; and 70% of the amount thereof, to the State Highway Department Fund, such funds to be further disbursed in the same manner and used for the same purposes as is set out in the "Arkansas Highway Revenue Distribution Law."